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Before the

FEDERAL COMMUNICATIONS COMMISSION

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Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

)

)

) IB Docket 98-118

1998 Biennial Regulatory Review -)

Review of International Common Carrier)

Regulations)

Reply Comments of the Secretary of Defense

The Secretary of Defense hereby files these reply comments in the above-captioned matter.

DOD filed comments herein on August 13, 1998. In writing those comments, DOD had interpreted the Notice of Proposed Rulemaking¹ ("Notice") to provide that the issuance of a blanket international Certificate of Public Convenience and Necessity ("Certificate") under Section 214 of the Communications Act of 1934, as amended, would have been preceded by an actual application. That application would have been subject (as now) to a pre-grant review by the Commission, with the opportunity for Executive Branch comment on matters of national security, law enforcement, foreign policy and trade concerns. If the blanket

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Certificate were granted, notices of the commencement of service by entities would thereafter also be subject to a public interest review possibly leading to conditioning of the Certificate previously granted or its revocation. DOD stated that it could conduct a national security review based on the information in the initial application. DOD requested guidance on the procedure governing the post-grant review and stated that onerous or unwieldy procedures that might be necessary to condition or revoke the Certificate previously granted would not serve the public interest.

The Commission's proposal is now understood to say that anyone who wishes to be a non-dominant international carrier serving non-affiliated routes would be granted full Section 214 authority without an application. Proposed Rule Section 63.25 is designed to permit anyone who wants to have the authority required by Section 214 to have it. No questions asked. Thirty days after commencement of operations under the Section 214 authority granted pursuant to proposed Section 63.25, the carrier would notify the Commission for the first time that it exists and is in business. It only has to do that once. (It is not clear if this notification would be placed on public notice.)

¹ Specifically, paragraphs 7 through 11, "Blanket Section 214

DOD cannot agree with the Commission's proposal. This is consistent with DOD's position in the Commission's recent proceedings on implementation of the World Trade Organization Basic Agreement on Telecommunications. There, DOD asserted that there should be no presumption in favor of approval of an application with respect to a public interest review for national security.

The Commission here² recognizes that national defense, law enforcement, foreign policy and trade concerns are matters affecting the public interest. However, denial of the opportunity for an initial review by responsible government agencies necessarily assumes that private parties with an optimistic business plan can decide all matters affecting the public interest, including national defense.³

Assuming, *arguendo*, that granting a Section 214 Certificate to an unidentified carrier can be based on a statutorily required finding that the public convenience and necessity will be served, other considerations apply.⁴

Authorization for International Service to Unaffiliated Points."

² Notice, paragraph 10.

³ In the Notice, the Commission notes that it has forborne from exercising its Section 214 authority for domestic CMRS service. Notice, paragraph 11 and footnote 22. In that 1994 Order, the discussion relating to Section 214 forbearance does not mention national defense or law enforcement, now formally recognized factors affecting public interest considerations for international service.

⁴ The FBI argues that Section 214 cannot be satisfied by this procedure. DOD supports this argument.

Section 214 grants the Secretary of Defense the right to receive a copy of and to be heard on applications for a Section 214 Certificate. Commission Rule Section 1.763(b) states that when a Certificate is required⁵, notice is necessary and a hearing is held upon request. The Commission cannot thwart a statutory right to be heard on an application by simply stating that no application is required. Congress believed that there were circumstances when the Secretary of Defense should be heard. Clearly, that was to precede the grant of a Certificate. Even now the Commission continues to agree that national defense is a public interest factor.

Affording only a procedurally unclear post-grant opportunity to attempt to condition or revoke a Certificate after the carrier has made an investment and is already providing service is illegal and imposes an impractical and likely insurmountable burden on the wrong party in interest. Proof that the grant of the application would serve the public convenience and necessity should continue


⁵ The Commission is not proposing to forbear from requiring a 214 Certificate. DOD agrees with this tentative conclusion. Under total forbearance, there would not be a Certificate to condition or revoke. Moreover, forbearance must be preceded by a determination that it will serve the public interest. The Executive Branch possesses acknowledged expertise on national security, law enforcement, et al. The Commission cannot itself determine the public interest relating to those factors and forbearance would not permit their consideration.


to be on the private party applicant and the converse proof not shifted to the government.⁶

CONCLUSION

The Commission should continue to require pre-grant applications before issuing a Section 214 Certificate.

Respectfully submitted,


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⁶ In its comments, DOD sought clarification of the Commission's procedures to condition and revoke. If the process for revocation follows the steps outlined in Section 312, a show cause order precedes a hearing at which the Commission has the burden of proof. Under Section 214, the applicant has to show its proposal will serve the public convenience and necessity.